(2D)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 77

WILLIAM W. McGREGOR, PERRY SHILTON, LOUIE HESS, ET AL.,

Petitioners,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

WILLIAM E. LEAHY,
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NICHOLAS J. CHASE,
EUGENE B. SULLIVAN,
Of Counsel.

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To the Honorable, the Supreme Court of the United States:

Petitioners pray for the issuance of a writ of certiorari to review a judgment of the Court of Claims of the United States entered December 7, 1942 (R. 24). Motion for New Trial was denied March 1, 1943 (R. 34).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, C. 140, 53 Stat. 752.

Decisions of Court Below.

The opinion of the Court below awarding judgment to the Respondent is contained in the record at Page 28; and the further opinion of the Court below denying Motion for New Trial may be found in the record at Page 34.

Summary Statement of Matter Involved.

On August 14, 1937, the Congress by statute conferred jurisdiction upon the United States Court of Claims to entertain and render judgment on the claims of William W. McGregor, Jack Wade, Perry Shilton, Louis Hess and Owen Busch. The claims sounded in tort for injuries resulting from a collision wherein petitioners sustained personal injuries when struck by a Civilian Conservation Corps truck on the public highway in Mesa Verde National Park, Colorado. Thereupon each of the petitioners timely instituted suit in his own right against Respondent (R. 1, 6, 10, 15, 20).

As in the average negligence case, the issues centered about the determination of liability and the extent of the damages. Petitioners were driving along the highway, returning from work in an automobile owned and driven by the petitioner, McGregor, and in which the other petitioners were passengers, when they were struck by the Respondent's truck. The testimony was in great conflict as to fault. Some seventeen hundred pages of testimony were taken before Commissioners of the Court of Claims of the United States. Proposed findings of fact were filed by each side and on April 25, 1942, the Report of the Commissioner was filed containing his Findings of Fact.

The Commissioner made findings of fact of a basic and underlying nature under the evidence adduced before him. The underlying facts so found related in general to the situs of the accident; the nature and speed of the colliding

vehicles; topography; condition and nature of the highway; time, visibility and other physical features; the occupants of the vehicles, their relation to each other, and the weight, contents and other characteristics of the vehicles; distances of the vehicles from each other and their position prior to the time of the impact; positions of the vehicles and location of the highway at the time of the impact; and position and location of the vehicles after the impact.

Appropriate record references are not included in the foregoing paragraph for the reason that under a long-standing custom the Court below will not permit the inclusion of the Commissioner's report in a certified transcript of the record prepared for use in this Court. Therefore, petitioners are at this time unable to include within the certified transcript of record the very Commissioner's report upon which they rely. Attention is respectfully invited to the prayer which serves as the concluding paragraph of this Petition wherein we specifically pray that if this Court determines to grant a Writ of Certiorari in the present causes the transcript of record be made to include the Commissioner's report.

From these basic facts the Commissioner made findings of ultimate fact. In particular, the Commissioner found that the driver of Respondent's truck was negligent in that he failed to exercise reasonable care under the circumstances, and further found that petitioners were free from contributory negligence.

The Commissioner then made findings with respect to the extent of the injuries, detailed losses incurred by each of the petitioners, and awarded damages to each of the petitioners in the following amounts: McGregor $2875.00; Wade $7500.00; Shilton $6500.00; Hess $6500.00; and Busch $4000.00.

Respondent filed exceptions to the report of the Commissioner on May 25, 1942. Petitioners filed a Brief on July

1, 1942, and Respondent filed a Request for "Special Findings of Fact" and Brief on July 31, 1942, and the cases came on for hearing before the Court of Claims of the United States on October 8, 1942.

In a three to two decision of December 7, 1942, the Court below repudiated the findings of the Commissioner and ordered judgment entered for the Respondent (R. 34). The majority (The Honorable Chief Justice Richard S. Whaley, and Honorable Associate Judges, Sam E. Whitaker and J. Warren Madden) made its own "special findings of fact" (R. 24), which for the greater part may be termed findings of underlying or basic facts, and then made findings of ultimate fact to the effect that Respondent's driver was free of negligence that proximately contributed to the accident, and that the petitioner, McGregor, the driver of the automobile in which petitioners were riding, was guilty of negligence which proximately contributed to the accident (R. 27). A conclusion of law was then entered, based on the so-called "special findings of fact", to the effect that petitioners were not entitled to recover, judgments rendered against the petitioners in favor of respondent, and petitioners assessed the cost of printing the records in these cases (R. 28). Judge Whitaker delivered the opinion of the court, an opinion which by its very language takes the evidence in the record, weighs it, both as to its accuracy and credibility—notwithstanding that not a single morsel of testimony had been heard by the Court en banc—and concluded that the petitions should be dismissed. Judge Jones, with Judge Littleton concurring, dissented (R. 33). To the minority the testimony was "hopelessly conflicting". Curiously enough, the minority felt that the "physical facts overwhelmingly support the testimony for the plaintiffs" (R. 34). Thus, putting aside the vital question involved when a reviewing body undertakes to determine to deter-

mine the credibility of witnesses whom it has not seen or heard, the minority found that under the physical evidence, with everything else out of the case, petitioners should have been granted recoveries and damages in the respective amounts set out in the findings of the Commissioner's report.

Plaintiffs filed a Motion for a New Trial (R. 34) and as the basis therefor laid two principal grounds:

(1) Error in repudiating and overturning the findings of the Commissioner who had heard the witnesses; and

(2) That Judge Whitaker had not disqualified himself as a Judge in the causes for the reason that he had been Government counsel in these very cases prior to his appointment to the Court below.

Ten copies of the Motion for New Trial are being furnished for the convenience of the Court as exhibits to this Petition.

Questions Presented.

I.

Is it not contrary to established law in the federal system for the Court of Claims of the United States to substitute its own findings of fact for those made by a Commissioner of that Court, where there is substantial evidence to support the findings made by the Commissioner and set forth in his report to that Court? Or, as specifically applied to the instant causes, is it not contrary to established principles for the Court of Claims of the United States in a case sounding in tort to pick and choose testimony from a record and draw inferences therefrom contrary to the facts and inferences found by a Commissioner who heard the testimony from the lips of witnesses and who examined the physical evidence incident to the issue involved? Is this not particularly true where the causes of action were

created by special acts of Congress, where the Court itself exists by reason of an Act of Congress, and where the Commissioner functions pursuant to acts of Congress? (See 28 U. S. C. A. Sec. 269.)

II.

Was it not improper for Judge Whitaker to sit as a Judge in the Court below in view of the fact that he had been Government counsel in these very cases prior to his appointment to the Bench of the Court below?

Reasons Relied Upon for Allowance of Writ of Certiorari.

I.

The Court of Claims of the United States has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision. Respondent must concede that the Court below substituted its own versions of the evidence for that of the Commissioner. In accordance with law and the established procedure outlined by Congress, a Commissioner was designated to hear the testimony in a cause sounding in tort, and the Commissioner was required to report the underlying and ultimate facts under all the evidence. Under Rule 40 of the Rules of the Court of Claims, which implements 28 U. S. C. A. Sec. 269, the basic and ultimate facts were found by the Commissioner. The Commissioner not only heard the testimony, but actually inspected the site of the collision and its environs. His report was filed with the Court below. It is respectfully submitted that the Court below was bounden to draw conclusions of law from the basic and ultimate facts so reported by the Commissioner *unless* the facts so found were not supported by substantial evidence and thus clearly erroneous. The language

of 28 U. S. C. A. Sec. 269 and of Rule 40 seems to contemplate that the Commissioner's findings shall be binding unless clearly erroneous. The Court below in its opinion does not state that the report of the Commissioner lacked substantial evidence with respect to the findings of fact therein embodied. Clearly from the language of the dissenting opinion it may be safely said that the findings were not clearly erroneous.

This is a case where the majority of the Judges in the Court below have seen fit to cull morsels and bits of testimony from the record, and thereupon repudiate the findings of the Commissioner, the nisi prius body specifically set up to take and weigh evidence, both as to its accuracy and credibility. To quote Mr. Justice Cardozo:

> "In fact, what the Court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *Federal Trade Commission v. Algoma Lumber Company, 291 U. S. 67, 73.*

Judge Jones of the Court below seems to have appreciated this when he pithily said "This is a fact case."

This Court well knows that under the Federal Rules of Civil Procedure, and under many decisions of this Court dealing with judicial review of determinations of fact by administrative bodies, the findings are not to be set aside unless clearly erroneous, and due regard is to be given to the opportunity of the trial body to judge of the credibility of the witnesses. See *Rule 52 of the Federal Rules of Civil Procedure; Adamson* v. *Gilliland*, 242 U. S. 350, 353; *Davis* v. *Schwartz*, 155 U. S. 631, 636; *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 420; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 261; *Federal Trade Commission* v. *Algoma Lumber Company, supra.* We respectfully submit that this is the uniform rule throughout

the federal system and throughout the states. The question thus presented is whether or not this settled rule of law is to apply to the Court of Claims of the United States when it sits as a reviewing body over the Commissioners of that Honorable Court. We submit that the question is a most important one and should be settled at this time.

II.

We respectfully submit that the failure of Judge Whitaker to disqualify himself involves a question of a policy which this Court should consider and resolve. We feel that the question of disqualification is peculiarly germane to causes arising in the Court of Claims of the United States, a legislative court. As we understand, the practice and policy of disqualification followed in this Honorable Court and other courts is rooted in the determination that the administration of justice shall avoid even the appearance of unfairness and partiality. Counsel do not propose to belabor this proposition and respectfully refer the Court to the argumentation advanced in the Brief appended to the Motion for New Trial.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued by this Court, directed to the Court of Claims of the United States commanding that Court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings, including the Commissioner's report, in cases numbered and entitled on its docket, No. 43693, William W. McGregor, Plaintiff, versus The United States, Defendant; No. 43665, Jack Wade, Plaintiff, versus The United States, Defendant; No. 43695, Perry Shilton, Plaintiff, versus The United States, Defendant; No. 43664, Louis Hess, Plaintiff, versus The United States, Defendant; and No. 43666, Owen Busch, Plaintiff, versus The United States,

Defendant, and that the judgment of the Court below be reversed by this Court, and that your petitioners have such other and further relief in the premises as to this Court may seem just.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 77

WILLIAM W. MCGREGOR, PERRY SHILTON, LOUIE HESS, ET AL., PETITIONERS

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The special findings of fact, conclusion of law, and opinion of the Court of Claims (R. 24–34) and its order denying petitioners' motion for a new trial (R. 34–35) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 7, 1942 (R. 34; Pet. 1). Petitioners' motion for a new trial was overruled on March 1, 1943. The petition for a writ of certiorari was filed on June 1, 1943. The jurisdiction

of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the Court of Claims may make findings of fact, concededly sustained by substantial evidence, which are contrary in their ultimate conclusion to those made by the commissioner of the Court of Claims in his report to the court.

2. Whether a judge of the Court of Claims was disqualified from participating in the hearing and determination of the case because he was Assistant Attorney General in charge of the Claims Division of the Department of Justice while the case was pending, where petitioners failed to object to his participation until after judgment was rendered against them.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix, pp. 13–14 *infra*.

STATEMENT

By private Act of Congress, approved August 14, 1937 (50 Stat. 1052), jurisdiction was conferred upon the Court of Claims to "hear, determine, and render judgment, as if the United States were suable in tort, upon the claims" of the five petitioners herein "for damages resulting from personal injuries sustained by them in a

collision with a Civilian Conservation Corps truck on the public highway * * * in Mesa Verde National Park, Colorado." The five petitions duly filed in the Court of Claims pursuant to this Act alleged that the collision was caused by the negligence of the driver of the Government truck and that petitioners, who were riding in a private automobile owned and driven by McGregor, were free of contributory negligence (R. 1-24).

The cases were referred by the Court of Claims to a commissioner who received evidence and rendered a report in each case (R. 25). A majority of the court then made special findings of fact, to the effect that the Government truck and petitioners' car, coming from opposite directions, were approaching each other at about 20 miles per hour, the car travelling on the wrong side of the road; that the driver of the truck saw petitioners' car when 350 or 400 feet away, blew his horn in warning two or three times and applied his brakes; that petitioners' car continued to come towards the truck on the wrong side of the road, and when a collision seemed imminent, the driver of the truck turned it toward the left side of the road (the then vacant part of the highway), but at the same time McGregor, observing the truck for the first time, also cut his car to his right, causing the collision which injured all the petitioners (R. 25–26). The court found

as ultimate facts that the truck driver was free of negligence, and that McGregor was guilty of contributory negligence (R. 27). The court did not decide whether McGregor's negligence was imputable to the other petitioners who were passengers in his car (R. 32), although it found that all the petitioners were employed in the National Park, and regularly travelled between their homes and the Park in McGregor's car, sharing the expenses of its operation (R. 27). The court concluded as a matter of law that petitioners were not entitled to recover and rendered judgment for the United States (R. 28). Judges Jones and Littleton dissented, expressing the opinion that the truck driver was guilty of negligence and that petitioners were not guilty of contributory negligence (R. 33–34).

Petitioners then moved for a new trial, taking exception to the participation of Judge Whitaker in these cases because they were pending while he was Assistant Attorney General in charge of the Claims Division of the Department of Justice (R. 34). A unanimous court denied the motion, on the ground that "at no time did [Judge Whitaker] direct or participate in directing the conduct of these cases, nor did he have any knowledge of the facts or issues involved until the cases were argued before" the Court of Claims more than three years after he ceased to be Assistant Attorney General (R. 34–35).

ARGUMENT

It must be assumed that there is substantial evidence to sustain the findings of fact made below, that the ultimate findings are sustained by the findings of evidentiary or primary facts, and that the court made findings of fact on all material issues, for petitioners do not assign any such matters as error. *Cf.* Sec. 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (28 U. S. C. § 288 (b)). Petitioners merely argue that the facts reported by the commissioner, who found the driver of the Government truck negligent and petitioners free from contributory negligence, were binding on the court below unless not supported by substantial evidence or clearly erroneous (Pet. 6–8). They further argue that Judge Whitaker should have disqualified himself because he was Assistant Attorney General while the case was pending in the Court of Claims. Neither of these contentions presents ground for review by this Court.

1. *The Commissioner's Report.*—A. Assuming *arguendo* that the commissioner's report is entitled to the weight for which petitioners contend, petitioners have prevented appraisal of the report under this standard through their failure to have certified to this Court either the report or the evidence below. Petitioners do request that if a writ of certiorari be issued, the Court of Claims be directed to certify to this Court a complete transcript of the record including the commis-

sioner's report (Pet. 3, 8), but no grounds for the adoption of such an exceptional procedure have been suggested, and there is nothing in the record or the petition to explain petitioners' failure to designate the evidence for certification to this Court in the manner prescribed by statute and rules of court.[1]

In regard to the commissioner's report, petitioners argue that a long-standing custom of the Court of Claims excludes it from the record certified to this Court (Pet. 3). To assume that any such custom, if it does exist, extends to cases in which a petitioner has properly requested the inclusion of the report as "parts of the record * * * material to the errors assigned" would hypothesize a practice directly contrary to an ex-

[1] Pursuant to Sec. 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. § 288 (b)), Supreme Court Rule 41 requires that a petition for writ of certiorari to the Court of Claims be accompanied by "a certified transcript of the record in that Court, consisting of the pleadings, findings of fact, conclusions of law, judgment and opinion of the Court, and such other parts of the record as are material to the errors assigned." Court of Claims Rule 99 (b), also issued pursuant to the statutory authority cited, provides that "whenever a certified transcript of the record is requested" by a party "for the purpose of filing a petition for a writ of certiorari in the Supreme Court," and that party "desires not only the pleadings, findings of fact, conclusions of law, judgment and opinion of the Court but also 'other parts of the record as are material to the errors assigned,' [he] shall file with the Court, not more than forty-five (45) days after judgment has been entered," a copy of the petition and such other parts of the record.

plicit rule of court. See Court of Claims Rule 99 (b), providing for the inclusion in the certified record of such "other parts of the record as are material to the errors assigned," in accordance with a request made by the petitioner within 45 days after judgment. In any event, there is nothing in the record or petition to show that the court below was requested to include the report in the record.

B. Even if there is substantial evidence in the record to support the commissioner's "findings," the Court of Claims is not bound by them, and is free to reach independent conclusions in performing its statutory duty to make special findings of fact and conclusions of law. Petitioners' contention to the contrary is based upon the Act of February 24, 1925, Sec. 1, c. 301, 43 Stat. 964, as amended (28 U. S. C. § 269) and Court of Claims Rule 40 (Pet. 6–7). Neither source lends support to that contention. 28 U. S. C. § 269 authorizes commissioners of the Court of Claims to take evidence in cases that may be assigned to them by the court and to "make report of the facts in the case to the court." It directs the court to provide by rules "for a finding and report of facts by a commissioner, to be filed in court with the testimony upon which the same is based, and for exceptions thereto, in whole or in part, by the parties to the suit" and for "a hearing thereon." But "nothing in this section shall be so construed as to prevent the court from passing upon all questions and findings with-

out regard to whether exceptions were or were not taken at the hearings before the commissioner." This proviso clearly authorizes the Court of Claims to reject the commissioner's findings and independently to make its own findings. *Pratt* v. *United States*, 85 C. Cls. 1, 33, certiorari denied, 302 U. S. 750. Rule 40 merely authorizes the commissioner "to ascertain the facts, including ultimate facts, considered by him to be established by the evidence and make a report of his findings to the Court within a reasonable time." Nothing in this rule or any other rule of the court makes the commissioner's findings binding upon the court.

The court's power to make findings of fact independently of the commissioner's report is a necessary corollary of its statutory power—nowhere vested in the commissioner—to "hear" and "determine" causes brought before it, both under the special Act here involved (Act of August 14, 1937, 50 Stat. 1052) and under its general jurisdiction (Judicial Code § 145, 28 U. S. C. § 250).[2] The commissioners are merely "facilities" of the court to aid in its "disposition of suits brought therein" (Sec. 1 of Act of February 24, 1925, as amended; 28 U. S. C. § 269); and their

[2] It also follows from the requirement that, upon a writ of certiorari from this Court, the Court of Claims certify the findings of fact and conclusions of law (Sec. 3 (b) of Act of February 13, 1925, as amended; 28 U. S. C. § 288 (b)); and this clearly means the findings and conclusions of the court itself, not those of its commissioners. *Cf. Botany Worsted Mills* v. *United States*, 278 U. S. 282, 290; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205; Supreme Court Rule 41.

functions are to be analogized, not to those of a *nisi prius* tribunal charged with the initial determination of a cause, but rather to those of an examiner taking evidence and reporting the facts to an administrative board, which is free to exercise an independent judgment and arrive at its own findings of fact. *Cf. N. L. R. B.* v. *Tex-O-Kan Flour Mills Co.,* 122 F. (2d) 433, 437 (C. C. A. 5); *Burk Bros.* v. *N. L. R. B.,* 117 F. (2d) 686, 688 (C. C. A. 3); *N. L. R. B.* v. *Elkland Leather Co.,* 114 F. (2d) 221, 225 (C. C. A. 3); *N. L. R. B.* v. *Oregon Worsted Co.,* 94 F. (2d) 671 (C. C. A. 9). This analogy is reinforced by the fact that commissioners are given "the general duties that pertain to special masters in suits in equity" (28 U. S. C. § 269), whose findings, in absence of a statute or rule to the contrary, are purely advisory and leave the court free to make its own independent findings. *Ex parte Peterson,* 253 U. S. 300, 312, 313; *Basey* v. *Gallagher,* 20 Wall. 670, 680; *Quinby* v. *Conlan,* 104 U. S. 420, 424; *Kimberly* v. *Arms,* 129 U. S. 512, 523, 524; *Boesch* v. *Graff,* 133 U. S. 697, 705.[3] No statute

[3] In *Ex parte Peterson, supra,* Mr. Justice Brandeis describes commissioners and similar officials as "agents or officers of the court who examine and digest accounts for the decision of the court. They do not decree, but prepare materials on which a decree may be made. * * * Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties." See, also, *Field* v. *Holland,* 6 Cranch 8, 21; *Railroad Company* v. *Swasey,* 23 Wall. 405, 410.

or rule limits the Court of Claims in its weighing of the evidence.

2. *Alleged Disqualification of Judge Whitaker.*—Petitioners have waived any right to object to Judge Whitaker's participation in the hearing and determination of this case on the ground that he held the office of Assistant Attorney General for a time while the case was pending. Although at the time of the argument and submission of the cause petitioners were aware of Judge Whitaker's former office in the Department of Justice, they made no objection to his presence on the bench during oral argument, nor did they question the propriety of his participation in the determination of the matter when they submitted the cause for decision (R. 35). Their objection was first raised upon a motion for new trial after judgment had been entered against them (R. 34–35). Since it is not pretended that their motion was based upon any newly discovered facts, their failure seasonably to raise the issue constitutes a waiver of any right to protest. *Cf. Ex parte American Steel Barrel Co.*, 230 U. S. 35, 44; *Refior* v. *Lansing Drop Forge Co.*, 124 F. (2d) 440 (C. C. A. 6), certiorari denied, 316 U. S. 671; *Scott* v. *Beams*, 122 F. (2d) 777 (C. C. A. 10), certiorari denied, 315 U. S. 809. Petitioners should not be permitted to gamble on the outcome of the case, by withholding their objection to a judge's participation until his decision is handed down.

Apart from their inability to question Judge Whitaker's qualification after judgment, petitioners' contention has no merit. At common law judges could participate in causes in which they had been counsel. *Cf. Thellusson* v. *Rendlesham*, 7 H. L. Cases 429; *Duncan* v. *Atlantic Coast Line R. Co.*, 223 Fed. 446, 447 (S. D. Ga.); *Ex parte N. K. Fairbank Co.*, 194 Fed. 978, 986, 987 (M. D. Ala); *Eastridge* v. *Commonwealth*, 195 Ky. 126, 241 S. W. 806. Even under the statutory basis for disqualification of judges of the district courts, which is not made applicable to the Court of Claims, Judge Whitaker's participation in the instant case would have been unobjectionable.[4] In the Claims Division of the Department of Justice, as is frequently true of other large organizations, the work of the Division is performed in large measure by its staff, some of whose members are authorized to affix the signature of the Assistant Attorney General to various documents. In these circumstances, the mere fact that the judge's signature had appeared on the correspondence and pleadings in the cause would not in any substantial sense constitute his having "been of counsel * * * for either party" within the

[4] The test in the district court is whether the judge "is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial." Judicial Code § 20, as amended (28 U. S. C. § 24).

meaning of 28 U. S. C. § 24, relating to district judges. *Rose* v. *United States,* 295 Fed. 687 (C. C. A. 4); *cf. Aetna Insurance Co.* v. *Travis,* 124 Kan. 350, 259 Pac. 1068, certiorari denied, 276 U. S. 628; *Kirby* v. *State,* 78 Miss. 175, 28 So. 846. Since Judge Whitaker at no time directed or participated in directing the conduct of these cases, nor had any knowledge of the facts or issues involved until the cases were argued before the court more than three years after he ceased to be Assistant Attorney General (R. 35), the claim of disqualification would fail by any standards. *Cf. Rose* v. *United States, supra.*

CONCLUSION

The decision below is correct and does not call for review. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
MELVIN RICHTER,
Attorney.

JULY 1943.

APPENDIX

The private Act of August 14, 1937 (50 Stat. 1052) provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred upon the United States Court of Claims to hear, determine, and render judgment, as if the United States were suable in tort, upon the claims of Jack Wade, Perry Shilton, Louie Hess, Owen Busch, and William W. McGregor, all of Mancos, Colorado, for damages resulting from personal injuries sustained by them in a collision with a Civilian Conservation Corps truck on the public highway on the crest of Navajo Hill, in Mesa Verde National Park, Colorado, on January 7, 1935: *Provided,* That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court: *Provided further,* That said suit shall be brought and commenced within six months of the date of the passage of this Act.

Act of February 24, 1925, Sec. 1, c. 301, 43 Stat. 964, as amended (28 U. S. C. Sec. 269), provides as follows:

> § 269. Commissioners of Court of Claims; appointment; powers; procedure.
>
> To afford the Court of Claims needed facilities for the disposition of suits brought therein said court is authorized and empowered to appoint seven competent persons, to be known as "commissioners", who shall

attend the taking of or take evidence in cases that may be assigned to them severally by the court and make report of the facts in the case to the court. Any commissioner shall proceed under such rules and regulations as may be promulgated by the court and such orders as the court may make in the particular case, and may have and perform the general duties that pertain to special masters in suits in equity. He may fix the times for hearings, administer oaths, examine witnesses, and receive evidence. Parties to the suit may appear before the commissioner in person or by attorney, produce evidence, and examine witnesses. Subpoenas for witnesses or for the production of testimony before the commissioner may issue out of the court by the clerk thereof and shall be served by a United States marshal in any judicial district to whom they are directed. The rules of the court shall provide for a finding and report of facts by a commissioner, to be filed in court with the testimony upon which the same is based, and for exceptions thereto, in whole or in part, by the parties to the suit, and a hearing thereon within such reasonable time as the court's rules or order may prescribe. Nothing in this section shall be so construed as to prevent the court from passing upon all questions and findings without regard to whether exceptions were or were not taken at the hearings before the commissioner. Any person appointed as commissioner may be removed at the pleasure of the court. (Feb. 24, 1925, ch. 301, § 1, 43 Stat. 964; June 23, 1930, ch. 573, § 2, 46 Stat. 799.)

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